On or about August 31, 1984, Respondent Police Department and its then Commissioner commenced a proceeding entitled *Ward v. Civil Serv. Comm'n*, Index No. 43772/84 (Sup. Ct. N.Y. Co. 1985), challenging the May 2, 1984 decision by the Commission.

Respondents refused to reinstate Petitioner during the pendency of this proceeding.

In a decision and judgment dated April 12, 1985 and entered on or about April 15, 1985, the Supreme Court, New York County (Greenfield, J.) dismissed the aforesaid proceeding (*Ward v. Civil Serv. Comm'n*), sustained the decision of the Commission and ordered Respondents to reinstate Petitioner.

In an order dated February 13, 1986, the Appellate Division, First Department unanimously affirmed the aforesaid April 15, 1985 judgment in *Ward v. Civil Serv. Comm'n*, 117 A.D.2d 1026, 498 N.Y.S.2d 240 (1st Dept. 1986).

On April 9, 1986, Petitioner was reinstated to Respondent Police Department pursuant to the May 2, 1984 decision of the Commission and the judgment in *Ward v. Civil Serv. Comm'n*.

On April 10, 1986, only one day after Petitioner's reinstatement to Respondent Police Department and before he had undertaken any duties upon reinstatement, Respondent Police Department terminated Petitioner's employment because he refused to sign a statement acknowledging the validity of Respondent Police Department's false, unlawful and improper claim that he was still a probationary Police Officer.

On April 14, 1986, only after Respondents had been contacted by Petitioner's attorney, Petitioner was again reinstated to his position as a Police Officer.

Petitioner was required by Respondents, as a condition of his reinstatement on April 14, 1986, to sign forms acknowledging that he had not completed his probationary period. In fact, and as the New York State Courts subsequently determined, Petitioner was not and could not have been deemed to be a probationary Police Officer in April 1986 or required to acknowledge such status.

Petitioner signed the aforesaid forms acknowledging that he was a probationary Police Officer under duress and because he was advised that Respondents would not reinstate him unless he acknowledged his alleged probationary status.

Following his reinstatement on April 14, 1986, Petitioner was required to retake Respondents' medical, physical and psychological examinations which are generally given to new appointees to the NYC Police Department.

On April 18, 1986, Petitioner's wife gave birth to a dead infant son. The funeral for the infant was held on April 24, 1986.

On April 24, 1986, the day of his son's funeral, Respondents telephoned Petitioner and ordered him to appear for psychological testing on April 28, 1986. Respondents denied Petitioner's request to delay this psychological testing.

Petitioner appeared for psychological testing, as directed by Respondents on April 28, 1986. The written psychological examinations that he was required to take were the same as he had taken and passed prior to his 1982 appointment as a Police Officer.

On May 22, 1986, Respondents again dismissed Petitioner.

Petitioner was not served with any formal disciplinary charges prior to his May 22, 1986 termination from Respondent Police Department, was not given any prior notice, and was not afforded either a pre-termination or a post-termination hearing.

Petitioner had not been assigned any police duties from the time of his "reinstatement" on April 14, 1986 until his termination on May 22, 1986, during which time he underwent retraining at the Academy and then performed clerical duties.

Respondents contended in prior litigations that Petitioner was dismissed on May 22, 1986 based upon Respondents' determination that: a) Petitioner was psychologically unfit to serve as a Police Officer; and b) Petitioner could be terminated without formal charges, prior notice or a hearing because he was a probationary employee.

On July 31, 1986, Petitioner moved in New York State Supreme Court for an Order, pursuant to New York Judiciary Law § 753, holding Respondents in contempt for violating the Court's April 15, 1985 judgment requiring Petitioner's reinstatement.

By Order dated May 12, 1987 and entered on May 19, 1987, Justice Greenfield of the Supreme Court, New York County referred Petitioner's contempt motion to Special Referee Frank Lewis to hear and report.

On twenty-two (22) separate hearing dates between November 1988 and March 1989, hearings on Petitioner's contempt motion were held before Special Referee Lewis of the New York State Supreme Court.

On July 23, 1990, Special Referee Lewis issued his report and recommendations on the record. In this decision, Referee

Lewis, in recommending Petitioner's reinstatement, indicated that:

> "The matters leading up to the reinstatement of Buric are no longer in issue. It is not for the Police Department or any organ of the City acting in conjunction with the Police Department in the matter of the reinstatement of Buric to review the grounds for which he was dismissed in the first place. The Court directed that he be reinstated. Therefore, he should be reinstated."(emphasis added)

Referee Lewis continued by stating:

> "None of the reasons advanced for failing to reinstate Buric, including his problems with alcohol, his family problems, including the death of his father and the stillbirth of a child, not his performance in jobs which he had while he was dismissed in the New York City Corrections Department, the New York State Corrections Department, the New York City Department of Transportation, and the New York City Health & Hospitals Corporation are in issue here."[1]

Referee Lewis also criticized the timing of Respondents' psychological evaluation of Petitioner, including that Petitioner was unfit to serve as a Police Officer.

Referee Lewis finalized his recommendation by recognizing that his report included:

> "Anything during his dismissal or prior to his dismissal. And one thing I did not state is the tour of duty with the Auxiliary Police. It includes that.

---

[1] It should be noted that Petitioner was not dismissed from any employment other than the New York City Police Department.

> The judgment of Justice Greenfield, as affirmed by the Appellate Division, wipes out all previous considerations. And the Civil Service Regulation wipe out considerations up until the point where Buric get back on the job."

In a decision dated February 1, 1991 and an Order and Judgment entered on April 8, 1991, the Supreme Court, New York County (Greenfield, J.): (I) confirmed the Report and Recommendations of Referee Lewis; (ii) held Respondent Police Department and its then Commissioner in contempt; (iii) directed Respondent Police Department to reinstate Petitioner; and (iv) ordered a trial to assess damages and back pay.

In its February 1, 1991 decision, and in holding Respondent Police Department in contempt, Justice Greenfield stated that:

> "This court's prior order upholding the determination of the Civil Service Commission clearly mandated that Buric was to be reinstated. Petitioners violated this order when, prior to reinstating Buric as a police officer, they required him to sign documents agreeing that he had three months remaining in his probationary period and to complete psychological testing four days after the funeral of his stillborn child. Certainly petitioners were aware of this court's unconditional direction for reinstatement. Respondent clearly was prejudiced by petitioners' actions, since he was discharged before resuming police officer duties. <u>There is ample basis in the record for the referee's finding that petitioners wilfully failed to comply with this court's order directing reinstatement</u>. It follows that petitioners are guilty of civil contempt." (emphasis added)

Justice Greenfield also stated in his February 1, 1991 decision that the NYC Police Department had improperly treated Petitioner as a probationary employee when it "reinstated" him in April 1986. In so doing, Justice Greenfield held that "Buric's agreement to be reinstated as a probationary employee, insofar as it was burdened with conditions for reinstatement, is unenforceable since the imposition of such a condition for reinstatement amounted to duress." (emphasis added)

In a Decision and Order dated and entered on October 15, 1991, the Appellate Division, First Department unanimously affirmed Justice Greenfield's April 8, 1991 Order and Judgment. In so holding, the court reiterated:

> "Petitioners' second termination of respondent was in bad faith to the extent it was based upon psychological testing inappropriately scheduled four days after a funeral for respondent's stillborn infant, and pre-department employment which had been deemed an insufficient basis for respondent's initial termination."(emphasis added)

In January 1992, Petitioner was reinstated as a Police Officer in Respondent Police Department. Subsequent to his reinstatement, Petitioner received competent rating reviews from Respondent Police Department for the years 1992, 1993 and 1994.

In February, 1995 Petitioner was recommended to full duty by Dr. Schwarzler, a psychologist for the NYC Police Department. As a result, Petitioner's duty status went to full duty.

In April 1997, Petitioner was suspended as a result of various charges brought against him by Respondent Police Department. There were three charges and specifications preferred against Petitioner. The first charge accused him of

having used excessive force against a prisoner. The second charge accused him of having removed a prisoner from the Precinct holding pen without permission or authority. The final charge accused him of having made a false official statement in that he denied striking a male prisoner named Johnny Dunham in the 44th Precinct holding pen on or about April 2, 1997.

On September 14, 15, 16 and 18, 1998, hearings were held before NYC Police Department Deputy Commissioner Koshetz on the aforesaid charges and specifications which had been preferred against Petitioner.

In a recommended decision dated March 19, 1999, Deputy Commissioner Koshetz recommended that Petitioner be found guilty of all three specifications preferred against him and that he be dismissed from Respondent Police Department.

On April 20, 1999, NYC Police Department Commissioner Howard Safir approved the recommendations of Deputy Commissioner Koshetz in their entirety, and ordered Petitioner dismissed from the NYC Police Department effective April 22, 1999. Petitioner was dismissed from the NYC Police Department on and effective April 22, 1999.

On or about August 19, 1999, Petitioner commenced an Article 78 proceeding in the Supreme Court, New York County entitled *Buric v. Safir* (Index No. 117575/99) to challenge his April 22, 1999 termination from the NYC Police Department.

The petition in *Buric v. Safir* included, *inter alia*, a claim pursuant to 42 U.S.C. § 1983 that Petitioner had been found guilty of bogus charges and disciplined in retaliation for his prior exercise of constitutional rights, including the right to petition.

The petition in *Buric v. Safir* was transferred to the Appellate Division, First Department by order entered on December 17, 1999.

In a revised Decision and Order dated January 17, 2002, the Appellate Division in *Buric v. Safir*, 285 A.D.2d 255, 736 N.Y.S.2d 342 (1st Dept. 2002): [I] annulled and dismissed Respondents' charges against Petitioner (other than Specification No. 2); [ii] annulled Respondents' decision terminating Petitioner's employment; [iii] directed Respondents' to impose a penalty less severe than termination for Specification No. 2; and [iv] remanded the matter to the Supreme Court for further proceedings on Petitioner's claims pursuant to 42 U.S.C. § 1983.

The Appellate Division ruled that the NYC Police Department's findings on Specification No. 1 (that Petitioner had assaulted a prisoner) and No. 3 (that Petitioner had lied during a NYC Police Department investigation) were "not supported by substantial evidence." The Court noted that the record demonstrated that the alleged victim's testimony had been coached by the NYC Police Department, and that the NYC Police Department had relied upon statement by three "witnesses" who were demonstrably not present at the time Petitioner supposedly assaulted the prisoner. In its decision, the Appellate Division stated:

> "The record clearly supports petitioner's contention that a pattern of retaliation was amply demonstrated and that respondent's determination was not supported by substantial evidence ...
>
> While the threshold required to annul the Commissioner's determination is a very high one, the Commissioner's findings in this case clearly demonstrate, on this record, the lack of any rational basis."(emphasis added)

The Court went on to note the "significant evidence" that the NYC Police Department's actions were biased:

> "Under the circumstances, viable issues exist as to whether petitioner's prior successful litigation was a substantial or motivating factor in respondent's decision to find petitioner guilty of the various charges and to then terminate him, doing so in the fact of overwhelming evidence indicating the use of tailored as well as tainted testimony. (emphasis added)
>
> Significant evidence of bias is apparent in the record, ..." (emphasis added)

The Court concluded by remarking "In short, Detective Wilson's actions, when taken as a whole, evince a pattern so calculated as to be indicative of retaliation."

On October 11, 2002, Respondents issued a revised penalty on Specification 2 pursuant to the Appellate Division's order. The revised penalty was forfeiture of five days vacation.

On March 5, 2003, Petitioner was reinstated to Respondent Police Department as a Police Officer pursuant to the Appellate Division's Order.

While Petitioner was on suspended status, he was working with the Society for the Prevention of Child Abuse ("SPCA") in Brooklyn. In February 2001, he was arrested for criminal impersonation of a police officer. The charge was eventually dismissed by the District Attorney's Office. Petitioner, eventually, commenced a lawsuit as a result of this arrest.

As a result of the Appellate Division directive, Petitioner recommenced employment with Respondents in March, 2003. In April 2003 and again in August 2003, Petitioner was referred back to Dr. Schwarzler for purposes of psychological evaluations. Dr. Schwarzler's evaluations took into account

all prior psychological evaluations as well as the charges brought against Petitioner for criminal impersonation and the incident in the 44th Precinct with the prisoner.

On September 9, 2003, Respondents gave Petitioner written notice that, based upon its psychological evaluation of him, it had asked the Medical Bureau of the New York City Police Pension Fund, Article II to examine him for retirement on the grounds of psychological disability.

The materials that Respondents supplied to the Pension Fund's Medical Board demonstrate that Respondents are claiming that Petitioner is psychologically unfit to serve as a Police Officer based, in substantial part, upon the very factors considered and rejected by the Supreme Court, New York County and/or by the Appellate Division, First Department in the four prior litigations in which Respondents' efforts to fire Petitioner were held unlawful.

B. Proceedings Below

On or about November 20, 2003, Petitioner commenced this action in the form of an Article 78 proceeding in New York State Supreme Court, *Buric v. Kelly, et al.* (Index No. 119631/03), to enjoin Respondents from continuing the pending proceeding to compel Petitioner's retirement from the New York City Police Department and alleging claims of retaliation pursuant to 42 U.S.C. § 1983.

More specifically, Petitioner alleged that, at least since 1986, Respondents were engaged in a pattern of retaliatory conduct to punish Petitioner for his protected activity in bringing litigations and administrative proceedings to challenge the Respondents' repeated efforts to terminate his employment, the most recent effort being Respondents' effort to have Petitioner retired involuntarily, for alleged psychological unfitness. Petitioner contended that these efforts were violative of his rights guaranteed by the First and

Fourteenth Amendments to the United States Constitution. As a result, Petitioner sought injunctive relief, compensatory and punitive damages and reasonable attorney's fees.

Petitioner, in his state claim (the second cause of action) also sought a judgment that the Respondents' action, in seeking Petitioner's involuntary retirement, was arbitrary, capricious, unreasonable and unlawful and in direct contravention of a previous order mandating Petitioner's reinstatement.

On or about November 24, 2003, Respondents removed this matter to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1441(b) and 1443.

The case was tried before the Honorable Harold Baer, Jr. and a jury between September 29, 2004 and October 6, 2004. Prior to the end of the trial, Judge Baer declined to exercise supplemental jurisdiction over Petitioner's state claim. The federal claim went to the jury. On October 6, 2004, the jury returned a Respondents' verdict.

Judgment dismissing the Complaint was dated October 6, 2004. On November 30, 2004, the lower court denied Petitioner's motion for a new trial pursuant to Fed.R.Civ.P. 59. Petitioner duly filed a Notice of Appeal and an Amended Notice of Appeal from both the Judgment and Order.

Petitioner duly appealed the Judgment to the United States Court of Appeals for the Second Circuit. In his appeal, Petitioner, *inter alia*, challenged several of the District Court's evidentiary and other rulings.

In a Summary Order dated December 6, 2005, the Court of Appeals affirmed the Judgment of the District Court. In doing so, the Court of Appeals ruled that the District Court did not abuse its discretion "in the admission of evidence

relating to Buric's public employment history prior to 1982, his previous terminations and suspensions from the NYPD, and various reports by NYPD psychologists." (App.)

The Court of Appeals also ruled that the District Court did not abuse its discretion in excluding a stipulation of settlement arising from Petitioner's 2001 arrest nor was the admission of the 2001 arrest itself erroneous. (App.) The Court of Appeals, however, found the admission of evidence relating to Petitioner's guilty plea to a charge of educational neglect and a report from the psychological exam he underwent to regain custody of his son was an abuse of discretion. However, the Court of Appeals considered that to be harmless error. (App.) The Court of Appeals, among other rulings, also rejected Petitioner's challenge of several jury instructions. (App.)

This petition follows.

REASONS FOR GRANTING THE WRIT

THE TOTALITY OF THE DISTRICT COURT'S RULINGS, AS SANCTIONED BY THE COURT OF APPEALS, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER, ESPECIALLY IN A CASE OF MUNICIPAL DECISION MAKING

A. Evidentiary Rulings

The introduction of inadmissible evidence was a clear abuse of discretion and was so clearly prejudicial to the outcome of the trial so that the jury reached a seriously erroneous result and the verdict was a miscarriage of justice. *Hygh v. Jacobs*, 961 F.2d 359, 365 (2nd Cir. 1992). Prejudice is measured in light of the record as a whole. *Hester v. Bic*

Corp., 225 F.3d 178, 181 (2d Cir. 2000). *See also, Cruz v. Jordan*, 357 F.3d 269, 271 (2d Cir. 2004). Petitioner respectfully submits that such a result occurred herein and that the District Court, as sanctioned by the Court of Appeals, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

The record is replete with instances where the court permitted Respondents to introduce evidence which relitigated incidents and evaluations, which had previously been invalidated by reviewing tribunals. This evidence tended to negate Petitioner's retaliation claim and instead bolstered Respondents' argument that their actions were justified.

The lower courts should not have permitted Respondents to defend their actions by relying upon the very factors considered and rejected by the State courts in four prior litigations and in which the State courts had already found the Respondents' alleged legitimizing factors to be unlawful.

The lower courts should not have permitted Respondents to introduce evidence which relitigated the merits of the following which had already been decided against Respondents.

1. Dr. Deborah Levitt and Police Officer Nathan McCain and Related Exhibits

Petitioner was terminated for alleged psychological unfitness in May 1986. This termination was based primarily on the 1986 evaluations and findings of Dr. Levitt (a psychologist) and Officer McCain (who evaluated Petitioner for alleged alcohol abuse). These findings were the subject of extensive litigation in *Ward v. Civil Service Commission*, 575 N.Y.S.2d 30 (1st Dept. 1991) and, as we have seen, were held to be improper. Nonetheless, the lower courts still considered

extensive testimony, which credited these reports and permitted the discredited reports themselves to be introduced.

Indeed, subsequent psychological reports continued to rely upon prior reports, which had already been sufficiently tainted.

2. Petitioner's Pre-1982 Employment

The lower courts considered extensive testimony and exhibits concerning Petitioner's pre-Police Officer employment history. This included stints with the Auxiliary Police, State Department of Corrections, City Department of Corrections, City Department of Transportation and Health & Hospitals Corporation. Respondents were permitted to legitimize their actions by relitigating the merits of this past history.

In *Ward v. Civil Service Commission*, *supra.*, the New York Appellate Division specifically stated that it was improper for Respondents, in its 1986 psychological evaluation, to have relied upon Petitioner's pre-Police Officer employment and history. However, at trial, the lower courts permitted Respondents to do just that. The lower courts condoned Respondents efforts to re-open these issues and utilize them to legitimize their actions. The lower courts should have rejected these efforts.

3. Proof Concerning the Alleged Prisoner Assault

In *Buric v. Safir*, 736 N.Y.S.2d 342 (1st Dept. 2002), the Appellate Division, we will remember, found the disciplinary charges against Petitioner, which accused him of assaulting a prisoner, to be without merit. Nonetheless, the lower courts condoned the efforts of Respondents to reopen the merits of this alleged incident, as if the Appellate Division never ruled. As such, there was extensive testimony concerning Petitioner's actions with reference to the prisoner issue.

The lower courts should not have provided Respondents with an opportunity to relitigate the merits of the prisoner incident.

4. Petitioner's 2001 Arrest For Allegedly Impersonating a Police Officer

Petitioner was arrested in 2001 for allegedly impersonating a Police Officer. These charges were ultimately dismissed and Petitioner sued Respondents for false arrest. Yet, the lower courts condoned the introduction of extensive testimony concerning the merits of the incident that led to the arrest. The lower courts, by doing so, improperly permitted Respondents to relitigate the merits of this incident.

5. The 1992-1995 Dr. Schwarzler Reports

Dr. Schwarzler, who evaluated Petitioner in 1992 after his reinstatement from his 1986 termination, issued three (3) reports concerning Petitioner during 1992-1995. In September, 1992, Dr. Schwarzler issued a report which relied heavily on the 1986 Levitt evaluation and the factors which underlay Petitioner's April 1983 termination (overturned by the New York City Civil Service Commission in 1984 and thereafter by the New York state courts in decisions the Police Department never showed to Dr. Schwarzler). Based upon this background - and without having seen any of the administrative or court decisions in Petitioner's favor - Dr. Schwarzler found Petitioner "not suitable for police work" in her September 14, 1992 report. Petitioner was retained on restricted duty as a result of this finding until 1996.

On May 27, 1994, Respondents had Petitioner evaluated by an outside psychiatrist, Dr. A. Pinsky. In a report dated May 27, 1994, Dr. Pinsky found that Petitioner had "... no psychiatric illness or disorder that would veto his going back to full-duty although his personality is somewhat quixotic.

My final opinion is that he can function adequately as a Police Officer."

On September 26, 1994 and in light of Dr. Pinsky;'s report and her own monitoring of Petitioner from January 1993 through September 1994, Dr. Schwarzler issued an updated report in which she recommended a restricted duty assignment for Petitioner "closer to regular patrol" to assess whether he could be returned to full duty.

On February 17, 1995, Dr. Schwarzler issued a memorandum to the Director of the Police Department's Psychological Services Unit finding that Petitioner is "psychologically suitable for full-duty police work."

Petitioner contended that all of the reports by Dr. Schwarzler improperly cited and/or relied on allegations which the Court's had already adjudicated in Petitioner's favor. As such, the lower courts should not have permitted Respondents to utilize them as a basis to legitimize their actions. Dr. Schwarzler's testimony, which relied upon these reports, only served to exacerbate the unfairness. Moreover, Dr. Schwarzler should not have been permitted to cite incidents and events which occurred prior to the date that she found Petitioner to be fit in 1995. Anything prior to the date that she found Petitioner to be fit should not have been in issue.

6. Allegations Concerning Petitioner's Interaction with Police Administrative Aides ("PAA's")

The lower courts condoned the introduction of testimony which referred to incidents between 1992-1994 in which Petitioner had disagreements with Police Administrative Aides.

These incidents also were mentioned in Dr. Schwarzler's reports and Dr. Norton's report. None of these incidents

resulted in formal disciplinary charges and the differing accounts have never been resolved. The lower courts should not have permitted Respondents to present hearsay testimony about these issues as contained in the psychological reports and elsewhere.

7. The More Recent Schwarzler and Norton Reports

The record revealed that Dr. Schwarzler's most recent report directly preceded Respondents' referral to the Medical Board. Yet, these reports relied upon nothing which had been validated. They relied upon and took into account everything upon which Petitioner had been vindicated. The lower courts should have precluded these reports and not have permitted their introduction.

Based upon the foregoing, the lower courts permitted a panoply of evidence which was improper and which permitted Respondents to relitigate the merits of many incidents and events which had already been decided in Petitioner's favor. This impermissibly bolstered Respondents' efforts to legitimize their actions. The District Court, as sanctioned by the Court of Appeals, so far departed from usual and accepted standards so as to call for this Court's supervisory power.

B. The Lower Court's Rulings with Reference to Certain Other Evidentiary Rulings Also Mandate this Court's Review

1. The Settlement Agreement Arising from Petitioner's Arrest

As already noted, the lower courts permitted testimony concerning the facts underlying Petitioner's arrest in 2001. However, to counter that testimony, Petitioner sought to introduce a stipulation of settlement in a lawsuit for false arrest that Petitioner had brought against the City. That lawsuit was settled for $25,000. The lower courts excluded

the stipulation of settlement. In doing so, the District Court permitted Petitioner to only mention "that suit was filed but not the outcome."

Petitioner should have been permitted to introduce and refer to the stipulation. Rule 408 of the Federal Rules of evidence expressly states that it does not require exclusion when such proof, rather than being offered to prove liability in the settled case, is offered "... for another purpose such as proving bias or prejudice of a witness..." In the instant matter, the settlement of the false arrest case was offered for other purposes. Moreover, this action arose after the stipulation was entered into. Therefore, the parties' agreement not to use the stipulation in other litigation was inapplicable to prevent the Petitioner from utilizing it in subsequently commenced actions.

In the motions *in limine*, prior to the trial, Petitioner stated that "In the event the Court precludes the proof Petitioner intends to offer relating to the settlement in Petitioner's civil litigation we ask permission to move in limine to preclude all proof relating to the February 2001 arrest." The District Court, once ruling on the admissibility of the stipulation, should have excluded all testimony relating to the February 2001 arrest. It did not do so, but, as we have seen, permitted Respondents to question as to the underlying facts of the arrest which Respondents withdrew. Yet, the jury never heard that Respondents paid Petitioner $25,000 as a result. The lower courts should have been consistent on this issue. The inconsistency was prejudicial to Petitioner.

2. Other Errors in the Receipt of Evidence

The lower courts also erred with respect to several other evidentiary rulings. For example, it permitted Exhibit EE into evidence. This exhibit purported to be an evaluation of Petitioner from 1997. Petitioner contested the propriety of

this evaluation and claimed that he had never seen it. Under these circumstances, the issuer of the evaluation, Sgt. Locicello, should have been required to testify. Sgt. Locicello did not testify and the evaluation was permitted into evidence.

The lower court, so far, erred by excluding Petitioner's proposed Exhibits 59 and 60. These were affidavits from Lillian Long and Carol DiDonato respectively and dealt with Petitioner's prior employment. Dr. Daley, Petitioner's expert, testified that he relied upon or used them in issuing his evaluation.

Petitioner argued that it was unfair to exclude documents that Dr. Daley relied upon or used, while a multitude of documents that Respondents' psychologists relied upon or used and even some that they did not rely upon or use were received in evidence.

C. Several Portions of the Jury Instructions Were Improper

Petitioner respectfully asserts that the District Court's jury instructions, as sanctioned by the Court of Appeals, were sufficiently erroneous with respect to four (4) important issues as to invoke this Court's review.

1. Collateral Estoppel

Under New York law, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action were the same." *Burgas v. Hopkins*, 14 F.3d 787, 792 (2nd Cir. 1994).

The federal courts must give the same preclusive effect to state court judgments as would be given that judgment under the law of the state in which judgment was rendered. 28

U.S.C.A. § 1738. *See also, Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 104 S. Ct. 892 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411 (1980). In New York, issue preclusion (collateral estoppel) can be applied in a later case if (1) there has been a final determination on the merits of the issue sought to be precluded; (2) the party against whom issue preclusion is sought had a full and fair opportunity to contest the decision invoked as dispositive in the later controversy; and (3) the issue sought to be preluded by the earlier suit is the same issue involved in the later action. *See, Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485 (NY Court of Appeals, 1979).

The District Court's instructions herein improperly advised the jury of the preclusive nature of the prior judicial and administrative determinations, which should have had full preclusive affect.

In Petitioner's proposed jury instruction No. 16, Petitioner requested the following jury instruction:

> "16. In addition to the stipulated facts I have just read, you are to consider yourself bound by all findings, rulings, decisions, orders and judgments made by the courts in the prior litigations between the parties. Matters which were decided in these prior litigations are final and binding on all the parties here, and you are not at liberty to ignore or second-guess decisions previously rendered by the courts. Specifically, the ruling in Petitioner's Exhibits 36-A, 36-B, 37, 38, 39, 40, 41, 42, 43, and 44, including all factual findings contained therein, cannot be disregarded by you even if you think you might have arrived at a different

> conclusion in one or more of these prior litigations. This case is not an occasion to relitigate what has already been decided."

Petitioner's counsel revisited this issue during the Charge Conference. Counsel stated:

> "Your Honor, before we get to damages, I had a requested charge about what we view as the collateral estoppel effect of decisions by prior cases. As your Honor is aware, having been on the state as well as federal bench, the Appellate Division has made findings of fact. There were findings of fact rendered in the prior cases here, they're in evidence before the jury and those findings are binding on the parties and they're binding on any trier of fact here. To the extent findings of fact were made in prior cases, this is not a case for those facts to be relitigated. Our proposed Charge No. 16 is not reflected in the charge and we believe that's required."

In essence, Petitioner opined that the jury should not be permitted to draw conclusions, which were different from the prior decisions. For example, the jury, argued counsel, should not be permitted to conclude that items such as the assault, Petitioner's prior employment or Dr. Levitt's evaluation could be a proper basis for the Respondents' actions.

The lower court rejected Petitioner's proposal. Instead, it fashioned a modification whereby the affect of the decisions was "limited to the time of those decisions."

The lower court adopted this "compromise" in the jury instructions. It instructed the jury:

> "Those decisions, insofar as they recite findings of fact are binding on you; however, you should bear in

> mind that those findings were made at an earlier point in time based only on the evidence before those courts with respect to issues that existed at the time that the decisions were handed down. These decisions are simply a consideration in a mosaic of the events that you have before you for your consideration and you will decide what weight they should be afforded."

Petitioner respectfully submits that this instruction confused the jury as to the applicability of the prior determinations and constituted an erroneous application of the law of estoppel. It gave the jury a license to disregard the importance of the previous findings and to substitute its judgment for the judgment of the prior tribunals. If the court had definitively charged the jury that the previous determinations were binding, as it should have, the result very well may have been different. The Court of Appeals even acknowledged that Petitioner's proposed instruction was a correct statement of the law. (App.)

2. The Mt. Healthy Instruction

An employee's claim of retaliation because of the exercise of a First Amendment right is analyzed under the framework set forth in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *See, Coogan v. Smyers*, 134 F.3d 479, 484 (2nd Cir. 1998).

In order to prevail under *Mt. Healthy*, a plaintiff must first establish, by a preponderance of the evidence, (1) that the plaintiff's conduct at issue was constitutionally protected, and (2) that it was a substantial or motivating factor in the defendants' actions. Once this burden is met, the defendants may escape liability only by proving, by a preponderance of the evidence, that the same employment action would have been taken absent the protected conduct.

The District Court, in its jury instruction, misapplied the standards of this affirmative defense. The District Court charged:

> "[I]f plaintiff establishes all the necessary elements to his 1983 claim, the defendants had the opportunity to prove by a preponderance of the evidence that they would have taken the same action, that is, that they would have made the same reference, a complaint to the medical board regardless of plaintiff's lawsuits.... Moreover, if the defendants proved to your satisfaction by a preponderance of the evidence that in good faith they believed that they were acting properly, even if mistaken in that belief, and even if plaintiff was injured by that conduct, the causal connection would fail and the defendants would prevail."

Petitioner's counsel, immediately before and after it was given, objected to this Charge. He argued that the court had correctly set forth the *Mt. Healthy* affirmative defense in the first portion of the instruction. However, he asserted that the last sentence beginning with "Moreover" was not reflective of the *Mt. Healthy* standard. Counsel continued:

> "That suggests that even if the Respondents don't prove by a preponderance of the evidence that they would have taken the same action, that they'd have another bite at the apple, the good faith defense. That's not the *Mt. Healthy* standard.

The District Court denied counsel's objection. The Court of Appeals affirmed.

Counsel's objection was valid. The District Court, in this instruction, by adding what appeared to be an additional affirmative defense confused the jury as to what the applicable affirmative defense and was a misapplication of the law as it

relates to *Mt. Healthy*. This instruction was also invalid and not rendered moot, as the Court of Appeals concluded.

3. Municipal Liability

The charge with respect to Respondent City's liability in this § 1983 action was also erroneous. In order to prevail on a § 1983 claim against a municipality, a plaintiff may show that there is a municipal policy or custom that constituted a constitutional violation.

In *Pembaugh v. City of Cincinnati*, 475 U.S. 469 (1986), the Supreme Court held that, for purposes of § 1983, a single decision by a final policymaker could establish municipal liability. *Id.* at 480. Official policy to establish municipal liability under § 1983 is sufficient where named officials have final unreviewable authority to make complained of decisions. In *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978), the Court noted that official policy may be "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." In this action, Petitioner asserted that Respondent Kelly, the Police Commissioner; and Eloise Archibald, the Director of Psychological Services, were such officials and that their actions and directions can bind the City and result in liability to the City under § 1983.

In *Purdy v. Town of Greenburgh*, 178 F.Supp.2d 439, 444 (S.D.N.Y. 2002), the court noted:

> "Where no municipal policy exists, liability may nonetheless arise from a course of action tailored to a particular situation by a municipal decision maker."

Petitioner asserted that the Commissioner and the others are such decision makers. The District Court incorrectly instructed the jury with reference to this issue. The District Court charged the jury as follows:

> "So, it's the City's liability, if any, that you determine and a municipality can only be held liable for a Section 1983 claim if the Petitioner shows that the municipality itself by virtue of its policy, custom, or practice caused the constitutional violation. That is to say, to prevail against the City of New York Petitioner must show that the alleged retaliation was a policy or practice or regulation adopted and promulgated by that body's officers.(emphasis added)

Petitioner also submits that the District Court confused the jury and misapplied the law with reference to the issue of municipal liability. It is simply untrue that a municipality "can only be held liable" if the [Petitioner] shows a "policy, custom or practice", without regard to the actions of those individuals who can bind the [Respondent]. Later on in the charge, the lower court attempted to cure this defect. Unfortunately, the District Court's efforts to clarify the matter only served to confuse the jury even more. Contrary to the Court of Appeals' Order, this claim was not moot.

4. Adverse Employment Action

In *Galadya v. NYC Board of Education*, 202 F.3d 636 (2nd Cir. 2000), the Second Circuit recognized that "less flagrant reprisals" than termination or a reduction in wages and benefits may be sufficient to constitute an adverse employment action. *Id.* at 640. The key, said the court, is to determine whether the alleged action creates a "materially significant disadvantage." *Id.* at 649.

An adverse employment action has been further defined as one which "affects the terms, privileges, duration or conditions of employment." *Dortz v. City of New York*, 904 F.Supp. 127, 155 (S.D.N.Y. 1995), *Pazamickas v. NYS Office of Mental Retardation*, 963 F.Supp. 190 (N.D.N.Y. 1997). The Second Circuit, in *De La Cruz v. NYC Human*

Resources Admin., 82 F.3d 16, 21 (2nd Cir. 1996), held that even a transfer to a different unit constituted an adverse employment action.

The District Court had to instruct the jury on this issue because it is an element to the cause of action of retaliation. Again, the District Court confused the jury and inappropriately marshaled the evidence as to what actions were adverse.

This was an important issue because Respondents asserted that the referral to the Medical Board was not, in and of itself, an adverse employment action. The District Court, during the Charge Conference, appeared to take a more global and correct view of what constituted an adverse employment action. The District Court noted:

> "I had thought the way to handle it – not that it is my case – was that we should use all of the things that happened to him along the way, all of the various suspensions and separations as the material adverse changes, and that that would account or provide you with this element easily and then you would simply seek the injunctive relief."

This should have been the correct viewpoint because it remembers that the § 1983 claim of retaliation involved much more than the referral to the Medical Board. It also involved the repeated terminations, restricted duty assignments, and psychological referrals, all of which Petitioner claimed were retaliatory and which the District Court never ruled were barred by the statute of limitations.

Unfortunately, during the Jury Instructions, the District Court appeared to forget that Petitioner's retaliatory claim included much more than the referral to the Medical Board. Instead, the District Court repeatedly referred to the Medical

Board referral as the only claimed adverse employment action in the case.

This was not the case. By doing so, the District Court marshaled the evidence and confused the jury as to what the claims of adverse employment action were in this case. Since the showing of an adverse employment action was a necessary element to Petitioner's burden and since the jury ruled against Petitioner in the Verdict Sheet Question No. 1, the very real possibility exists that the jury would have answered Question No. 1 differently had the District Court given a more expansive definition of adverse employment action as it had suggested during the Charge Conference. Since the jury may have reached a different result with a proper instruction, the Court of Appeals should have revered, rather than considering many of the issues as moot based upon the jury's response to Question No. 1.

Based upon the foregoing totality of circumstances, the District Court, as sanctioned by the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WOLIN & WOLIN, ESQS.

By: Alan E. Wolin, Esq.
Counsel of Record
420 Jericho Turnpike, #215
Jericho, New York 11753
Telephone: (516) 938-1199
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 04-5884-cv

[Filed December 6, 2005]

JOHN BURIC,
Plaintiff-Appellant,

v.

RAYMOND KELLY, Individually and as the Commissioner of the New York City Police Department, THE NEW YORK CITY POLICE DEPARTMENT, THE NEW YORK CITY POLICE DEPARTMENT ARTICLE II PENSION FUND and CITY OF NEW YORK,
Defendants-Appellees.

PRESENT: HON. SONIA SOTOMAYOR,
HON. ROBERT A. KATZMANN,
Circuit Judges,
HON. RICHARD K. EATON, Judge.*

* The Honorable Richard K. Eaton, United States Court of International Trade, sitting by designation.

SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the United States District Court for the Southern District of New York (Baer, J.) is AFFIRMED in part and VACATED and REMANDED in part.

Plaintiff-appellant John Buric ("Buric") appeals from the judgment, after a jury trial, dismissing Buric's complaint and denying his motion for a new trial. We assume the parties' familiarity with the facts of this case, its relevant procedural history, and the issues on appeal.

Because Buric did not move for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 during or after the trial, we review his claim that the evidence at trial was insufficient to support a verdict for the defendants only to prevent "'a manifest injustice' . . . 'where a verdict is wholly without legal support.'" *Varda, Inc. v. Ins. Co. of North Am.*, 45 F.3d 634, 638 (2d Cir. 1995) (quoting *Sojak v. Hudson Waterways Corp.*, 590 F.2d 53, 54 (2d Cir. 1978) (per curiam)). Contrary to Buric's assertion, the verdict here was supported by evidence of Buric's psychological troubles over the course of two decades and the testimony of the New York Police Department ("NYPD") psychologist who found him unsuitable for full duty police work and her supervisor who approved that conclusion.

Buric next challenges a number of the district court's evidentiary rulings, which we review for abuse of discretion. *See Tesser v. Bd. of Educ.*, 370 F.3d 314, 318 (2d Cir. 2004). An evidentiary error in a civil case is harmless "'unless [the appellant demonstrates that] it is likely that in some material respect the factfinder's judgment was swayed

by the error.'" *Id.* at 319 (quoting *Costantino v. David M. Herzog, M.D., P.C.*, 203 F.3d 164, 174 (2d Cir. 2000) (quotation marks and citation omitted)). We find no abuse of discretion in the admission of evidence relating to Buric's public employment history prior to 1982, his previous terminations and suspensions from the NYPD, and various reports by NYPD psychologists. The evidence was admitted to show what the NYPD psychologists relied upon and how they came to their conclusions that Buric was not psychologically suitable for full duty police work, not the improper purpose of relitigating events previously decided in Buric's favor in state court.

The district court also did not abuse its discretion in excluding the stipulation of settlement arising from Buric's 2001 arrest for impersonating a police officer because Buric plainly sought to use the evidence to establish liability, the exact purpose that Rule 408 of the Federal Rules of Evidence forbids. Nor was the admission of the 2001 arrest itself erroneous where Buric had the opportunity to explain the arrest and inform the jury that he had filed a lawsuit as a result and that the charge was dropped.

We agree with Buric that the admission of evidence relating to Buric's guilty plea to a charge of educational neglect and the report from the psychological exam he underwent to regain custody of his son was an abuse of discretion because the evidence was not pertinent to why the NYPD referred Buric for involuntary retirement. Any error, however, was harmless in light of the significant admissible evidence of Buric's psychological problems and family issues over the two decades of his career with the NYPD.

We further reject Buric's challenge to the district court's failure to give his proposed jury instruction on the law of

issue preclusion. Even assuming that his instruction was a correct statement of the law, the district court's instruction was not erroneous and this Court will not overturn a jury verdict even if a more complete jury instruction could have been given. *Densberger v. United Techs. Corp.*, 297 F.3d 66, 73 (2d Cir. 2002) (internal quotation marks and citation omitted).

To the extent that, by agreeing to the proposed language, Buric did not waive his objection to the jury charge on whether the referral to the Article II Medical Board for involuntary retirement was the only adverse employment action at issue in this litigation, we review the instruction for plain error. *United States v. Crowley*, 318 F.3d 401, 412, 414 (2d Cir. 2003). An error is plain where it is clear or obvious and affects a party's substantial rights. *United States v. Olano*, 507 U.S. 725, 735, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). The "repeated terminations" and "restricted duty assignments" that Buric claims were retaliatory all took place prior to 2000 and thus are beyond the three-year statute of limitations for this case, which Buric commenced in 2003. *See Jewell v. County of Nassau*, 917 F.2d 738, 739 (2d Cir. 1990) (holding that N.Y. C.P.L.R. § 214 governs limitations period for § 1983 actions brought in federal district court in New York); N.Y. C.P.L.R. § 214 (McKinney 2003). With respect to the referral for psychological evaluation in April 2003, this Court has not held that referral for psychological examination, without more, is an adverse employment action and thus even if the failure to instruct the jury on this point was error, it was not plain.

We also reject Buric's contention that the district court abused its discretion in failing to dismiss a juror who had received an anonymous phone message about the case during the trial. After questioning by the district court and the

parties, the juror stated that he had no reason to believe that the call came from either party and that it did not affect his impartiality. The district court declined to dismiss the juror, finding his answers "candid[and] forthright[]." The district court "is in the best position to assess the demeanor and credibility of the jurors," *United States v. Breen*, 243 F.3d 591, 597 (2d Cir. 2001), and, on these facts, we find no abuse of discretion. *See United States v. Aiello*, 771 F.2d 621, 630 (2d Cir. 1985) (finding no abuse of discretion where the district court did not dismiss a juror after an unidentified third party called her twice and approached her in person), *abrogated on other grounds*, *Rutledge v. United States*, 517 U.S. 292, 301, 307, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996).

Finally, Buric's objections to the jury charge with respect to the burden shifting framework of *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), and municipal liability, as well as his challenge to the second jury interrogatory and the dismissal of Police Commissioner Kelly as an individual defendant are moot because the jury found no § 1983 violation.

We do find merit, however, in Buric's challenge to the dismissal of his state law claim pursuant to N.Y. C.P.L.R. §§ 7801-06 (Article 78) prior to the end of trial. Where, as here, a state law claim arises out of the same events that give rise to the federal claim, a district court has discretion to decline supplemental jurisdiction only if its decision is based on one of the enumerated categories under 28 U.S.C. § 1367(c). *Treglia v. Town of Manlius*, 313 F.3d 713, 723 (2d Cir. 2002); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 448 (2d Cir. 1998). The district court did not ground its refusal to exercise supplemental jurisdiction on

any of the enumerated categories under § 1367(c). We therefore vacate the dismissal of the state law claim and remand to the district court to reconsider its decision and, if a basis exists, to articulate the ground for its dismissal under § 1367.

We have considered all of Buric's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED with respect to Buric's claim pursuant to 42 U.S.C. § 1983 and VACATED and REMANDED to the district court to reconsider whether to take supplemental jurisdiction of Buric's state law claim.

FOR THE COURT:

Roseana B. MacKechnie, Clerk
/s/ _____
Lucille Carr

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 03-CIVIL-9375 (HB)

[Filed November 30, 2004]

JOHN BURIC,
Plaintiff,

v.

RAYMOND KELLY, Individually and as the Commissioner of the New York City Police Department, THE NEW YORK CITY POLICE DEPARTMENT, THE NEW YORK CITY POLICE DEPARTMENT ARTICLE II PENSION FUND and CITY OF NEW YORK,
Defendants.

Hon. HAROLD BAER, JR., District Judge

ORDER

WHEREAS plaintiff moved pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 59 for a new trial on the grounds that an anonymous telephone call to a juror during

the trial may have intimidated the juror and thereby impacted deliberations to the plaintiff's detriment; and

WHEREAS the juror informed the Court during the course of trial that he had received a voicemail message -- which the Court and counsel listened to the following day -- in which the anonymous caller stated, "I understand you're on a jury in New York that I have an interest in and when you get a chance, I want to talk to you," Tr. at 545:3-5; and

WHEREAS upon questioning by plaintiff's counsel, the juror stated that he "had no communication with either side . . . [and] ha[d] no interest in the outcome other than the fact that [he was] sitting here as a juror," Tr. at 546:7-9; and

WHEREAS the juror further noted that he "ha[d] no knowledge whatsoever as to where the call came from and [he] could not begin to speculate," Tr. at 546:12-13; and

WHEREAS based on this inquiry, there is no reasonable basis to believe that the voicemail message in any way affected the juror's partiality or influenced his deliberations; and

WHEREAS the Supreme Court has observed that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote," *Smith v. Phillips*, 445 U.S. 209, 217 (1982), and therefore, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation," *id.*; and

WHEREAS instead, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial

occurrences and to determine the effect of such occurrences when they happen," *id.*; and

WHEREAS the Court satisfied its duty under *Smith* and no new trial is necessary because here the content of the voicemail was relatively benign, the juror was not intimidated or shaken, the juror notified the Court immediately upon receipt of the message, and the following day the Court investigated the circumstances surrounding the voicemail, allowed counsel to inquire, and satisfied itself that the juror answered such questions candidly and would remain impartial and fairly weigh the evidence; and

WHEREAS the Court previously resolved the thrust of plaintiff's Fed. R. Civ. P. 60 motion to amend the judgment in its October 25, 2004 order, in which the Court ordered, *inter alia*, that it would adhere to its October 5, 2004 ruling and decline to exercise supplemental jurisdiction over plaintiff's state law cause of action; it is hereby

ORDERED that plaintiff's Fed. R. Civ. P. 59 and 60 motions are denied; and it is further

ORDERED that the Clerk of the Court close these motions and any remaining motions and remove this case from my docket.

SO ORDERED.

/s/ _____
U.S.D.J.

New York, New York
November 30, 2004

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 03-CIVIL-9375 (HB)

[Filed October 6, 2004]

JOHN BURIC,
Plaintiff,

v.

RAYMOND KELLY, Individually and as the Commissioner of the New York City Police Department, THE NEW YORK CITY POLICE DEPARTMENT, THE NEW YORK CITY POLICE DEPARTMENT ARTICLE II PENSION FUND and CITY OF NEW YORK,
Defendants.

JUDGMENT

The issues in the above-entitled action having been brought on for trial before the Honorable Harold Baer Jr., United States District Judge, and a jury on September 27, 2004, and at the conclusion of the trial the jury having returned a verdict in favor of the defendant, it is,

ORDERED, ADJUDGED AND DECREED: That the Complaint be and it is hereby dismissed.

DATED: New York, New York
October 6, 2004

SO ORDERED

/s/_____
USDJ

APPENDIX D

RELEVANT STATUTORY PROVISION

42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."